In the Supreme Court of the United States.

OCTOBER TERM, 1899.

HENRY L. MITCHELL, GOVERNOR, ETC., et al., appellants,
v.
CHARLES M. FURMAN, AS ADMINISTRATOR, etc., et al.
No. 158.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS FOR WANT OF JURISDICTION.

Appellees contend in their motion and brief that the appeal from the decision of the circuit court should have been to the circuit court of appeals and not to this court.

Their brief sets out certain of the averments of the bill and answer and advises this court of the holdings of the master, and declares (p. 14) "that the controversy thus arose under the laws of the United States," and on page 12, alleges that neither the validity nor the construction of a treaty is drawn in question by bill, answer or other proceedings in the court below.

Appellees are estopped from the contention made upon this motion, and we think they place themselves in an

unfavorable light before the court upon the record by the position now assumed, since it was necessary for appellants to choose one of two courts of review, and if they had chosen the circuit court of appeals their appeal would have been dismissed upon the averments of complainants' bill and defendant's answer.

In their bill (Record, p. 5) complainants allege as follows:

> That this cause arises under the said treaty between the United States and Spain, which ratified and confirmed the said grant to the said Joseph Fish, under whom your orators claim title. *And the controversy involved in this cause necessarily involves the construction of said treaty.*

This allegation is coupled with the averment of the value of the land and occupies a paragraph by itself.

Appellees did not expect then that the circuit court would do other than sustain the validity of the act of May 23, 1828, and they framed their bill that they might have the final decree reviewed by this court.

Under the act of August 13, 1888, upon the case made by the bill, complainants had the choice of any one of three grounds to have maintained their bill in the circuit court: (1) That the case arose under the laws of the United States; (2) that it arose under a treaty; (3) that it was a controversy between citizens of different States.

Complainants selected as the ground of jurisdiction that the case arose under the treaty made between Spain and the United States, and their purpose in making this selection is apparent when the language of their averment is considered. (Record, p. 5.) This averment gave

jurisdiction to the circuit court. What was the purpose of the next sentence—"and the controversy involved in this cause necessarily involves the construction of said treaty?" It was placed in the bill to give this court jurisdiction on appeal and for no other purpose. The language follows the wording of the act of March 3, 1891.

Having made this averment at the outset of their case, how can they now stand before this court and argue that the construction of this treaty was not before the circuit court, and thus attempt to defeat the very jurisdiction invoked by themselves and render of no effect the language of their bill, which served as a guide and dependence to appellants in selecting the court of review?

As a matter of fact, the construction of the treaty of 1819 was before the court below and was argued by both parties in (1) the motion to dismiss for want of jurisdiction, (2) the demurrer for want of jurisdiction, (3) before the master, and (4) on exceptions to the findings and opinion of the master.

APPELLANTS' MOTION TO DISMISS IN THE COURT BELOW FOR WANT OF JURISDICTION.

Appellants set out as grounds why the court was without jurisdiction numerous grounds which involved the construction of the treaty of 1819. (1) The United States had not recognized the title to the lands set up by the bill; (2) the title set up by the bill is determinable by the Executive Department of the United States; (3) that the bill set up a claim of a political nature. (Record, p. 11.)

Upon each of the above points the construction of the treaty of 1819 was argued before the circuit court at the outset of the case. Appellees contended that the treaty as construed in the case of *United States* v. *Wiggins* (14 Peters, 334) and *United States* v. *Perchman* (7 Peters, 51) excluded from all the laws relating to the ascertainment of claims and titles to lands in Florida all perfect grants or complete titles; that these titles were confirmed by the treaty, needed no legislative sanction, and hence were not required to be presented to any board, court, or tribunal whatever. The bill is drawn on this theory, and no mention is anywhere made in the bill that the claim in controversy was ever presented to the board for ascertaining titles to land in Florida. They plant their case squarely on the effect of the treaty, and set out their title as follows: "Your orators further show unto your honors that the said tract of land was granted by the Government of Spain unto José, or Joseph, Fish * * * on or about the 19th day of June, 1795, which grant was ratified and confirmed by the United States by the treaty with Spain." (Record, p. 1.)

Appellants contended before the circuit court that upon a proper construction of the treaty and the rules of pleading complainants in their bill stated themselves out of court (Record, p. 14, and Record, p. 11, fourth ground to dismiss), that the treaty recognized complete titles and ratified and confirmed inchoate titles. This contention was renewed in the demurrer and in the answer. Paragraph 7 of the answer (Record, p. 20) avers as follows: "They deny that the treaty with Spain * * * ratified and confirmed any grant of lands in controversy."

In support of appellants' construction of the treaty, the court was cited to the language of this court in the case of *United States* v. *Wiggins*. (14 Peters, 349.) "To this class of cases the eighth article was intended to apply." "These are the imperfect claims to which the eighth article of the treaty with Spain refers."

The circuit court sustained the construction of the treaty contended for by appellees, and appellants were required to answer the bill.

Appellees cite in their brief *Muse* v. *Hotel Company* (168 U. S., 437), that it was the duty of the court to determine the category within which the alleged title fell, and that such determination would not involve the construction of the treaty of 1819.

We contend that the case is not applicable for the reason that there was a substantial dispute between the parties as to the construction of the treaty into whichever category the alleged grant was placed.

Appellants contend that complete titles were covered by the second article of the treaty; and that the act of 1828 required the title to be examined and adjudicated by the district court, whether it was a complete title or an inchoate title.

Appellees in their bill contend that complete titles were ratified by the eighth article, but before the master that they were exempt by the eighth article. (See 53d exception to opinion of the master, Record, p. 96.)

In the motion of Cummings to dismiss (Record, pp. 12, 13) one ground of the court's want of jurisdiction is that by the bill it appears appellee's claim has never been

recorded, nor the lands segregated from the public domain, and therefore the rights of the holders of the alleged title could only be determined by the political department of the Government.

Upon argument this contention was strenuously urged by appellants. It was pointed out that the courts of the country could go no further in carrying out treaty obligations than the political department of the Government had authorized. It was further contended that as the claim had been before the Fifty-second and Fifty-third Congresses, which had refused to recognize it as valid, and as the executive department had continuously refused to recognize it for sixty years, the circuit court should follow the political branch of the Government in its construction of the obligation of the treaty of 1819, and refuse to take jurisdiction of the title alleged.

THE DEMURRER TO JURISDICTION (Record, p. 14).

The demurrer set up the following matters involving the construction of the treaty: (1) The statute of 1828; (2) that the title set up by the bill had not been recognized by the United States; (3) that the title derived from Spain had never been recorded under the laws of the United States; (4) that the title must be determined by the political department of the United States. The demurrer of the railroad company (Record, p. 17) in its seventh ground set up a grant to the United States of the lands in controversy by the treaty with Spain.

On the argument of the demurrer not only was the construction of the treaty of 1819 argued and considered, but the court announced its determination as based upon

the construction by this court in *United States* v. *Wiggins* as understood by the court. Appellants contend that the court below did not correctly construe the treaty of 1819, and did not apprehend its true construction set out in the several decisions of this court.

The ninth assignment of error to this court (Record, p. 106) is because by a correct construction of the treaty with Spain, and the acts of Congress for the settlement of land claims in Florida, the statutes made by the United States barred the claim of the complainants.

THE ANSWER OF APPELLANTS.

The defendants below accepted the proffered inquiry into the construction of the treaty of 1819 made by the bill, and in paragraph 23 (Record, pp. 21 and 22) say: "They admit that the controversy involves the construction of the treaty between Spain and the United States; * * * that perfect or complete grants were recognized by the treaty with Spain, but incomplete grants were ratified by the treaty, to the same extent they would have been valid had the territory remained under the King of Spain."

While consent will not give jurisdiction where the same is wanting under the law, the fact that complainants invoked the jurisdiction which the circuit court possessed to construe the treaty of 1819 and defendants admitted upon the record the necessity for the court to pass upon the question is a sufficient estoppel against either of the parties in this court seeking to deny that the questions thus submitted were considered in the court below.

But appellants, in paragraph 27 of their answer (Record, p. 22), aver the lands in controversy were named in the treaty of 1819 as part of the royal domain "not theretofore granted;" that if Fish obtained any concession it was from a person not the governor, not by the King of Spain or his lawful authorities, named in the treaty of 1819 as the source of authority for all grants by it recognized or confirmed. (Record, pp. 19 and 24.)

This alleged grant was made by one Morales during an "alleged illness" of the governor, and there is necessarily involved in the case the construction of the language of the eighth article of the treaty "*por sus legítimas autoridades.*" Whether any person except the subdelegate of the King was embraced in the term "his lawful authorities" see twenty-first exception to the opinion of the master (Record, p. 83; see master's report, Record, pp. 68, 69, 70; see appellants' brief, pp. 88–91). Appellees contended in the circuit court that the treaty of 1819 by its eighth article ratified and confirmed their alleged title, and upon this contention the master passed judgment, and on page 77 of record says: "By a proper construction of the eighth article of the treaty (this grant) stood confirmed;" and he takes two pages of the record to argue upon and explain his construction of the treaty with Spain, and show how it differs from the treaty with Mexico. Yet appellees now say the construction of the treaty was not drawn in question in the circuit court.

Appellants also contended before the court on demurrer, and before the master, that the decision of this court, in the case of Arredondo construing the treaty of 1819

as a grant *in præsenti*, was rendered under the authority and directions conferred on this court by the act of 1828, in a suit wherein the United States consented to be sued and prescribed the rules of decision; that in a case of title resting wholly upon a grant from a foreign nation, not otherwise recognized or confirmed—save only by the treaty—the circuit court must construe the treaty as this court construed it in *Foster* v. *Nielson* (2 Peters, 314); that this court had so declared in the *Arredondo Case* (6 Peters, 743), where the court say: "Should we be called on to decide upon the validity of a title acquired by any Spanish grant not embraced by these laws we should feel bound to follow the course pursued in *Foster* v. *Nielson*." Yet, although appellees rested alone on their alleged grant, the court below refused to accept the construction of the treaty declared in *Foster* v. *Nielson*, but erroneously held that the title was ratified and confirmed by the treaty and was therefore not within the purview of the several acts of Congress relating to the ascertainment and recording of titles to lands. Not only was the language from 6 Peters, 743, above quoted, read to the court, but the New York cases (*Jackson* v. *Waters*, 12 John, 365; *Jackson* v. *Ingraham*, 4 John, 163), to the same effect, were cited in vain in argument in the court below.

While there can be no question that the concession, if genuine, was but an inchoate title, into whichever category the court placed it, we contend that the court below failed to follow the true construction of the treaty as declared by this court in the case of a title emanating from a foreign government unsupported by any act of

Congress, and committed error which is reviewable by this court and not by the circuit court of appeals.

Further, the constitutionality of the act of May 23, 1828, was directly assailed by appellees in the court below, and the master and the court held that if the twelfth section applied to complete title it was unconstitutional and void.

The master reports "it was therefore only claims within the provisions of this article [inchoate claims] which Congress had the power to legislate upon. * * * The language, therefore, in the act 'all claims' 'embraced by the treaty,' 'within the purview of the act,' can mean nothing else than inchoate or imperfect claims, with which alone the United States had the right to deal." (Record, p. 80.)

Why had not the United States a right to deal with any but inchoate titles? Because, as contended by appellees in the court below, any legislation by Congress would be unconstitutional. But Congress, by the act of May 23, 1828, did plainly and unequivocally require that *all* claims to land within the Territory of Florida *embraced by the treaty of February 22, 1819*, etc., with only two exceptions, should be adjudicated by a court of the district within which the land lay (6 Peters, p. 721), and the fourth section of the act of May 26, 1830, required "all the remaining claims which have been presented according to law and not finally acted upon to be adjudicated and finally settled by such court," and such requirements of the law were only avoided by the court holding the statute unconstitutional if it meant what it said, and

refusing to give the law force and effect. (See appellant's brief, filed, pp. 30–36, meeting the contention of appellees in the court below upon the question of the constitutionality of the act of 1828.)

The constitutionality of the law of Congress was drawn in question, and the decision of the court below upon the question was prejudicial to the rights of appellants, and the act of March 3, 1891, for that reason also gives this court jurisdiction of this appeal.

Appellants' fifth, sixth, and ninth assignments of errors bring before this court and sufficiently designate this ground of appeal.

Appellees, in their brief on the motion to dismiss, after stating that the appeal can not be sustained upon the ground relied upon by appellants, proceed to take a still greater amount of space to prove it can not be sustained upon grounds brought forward by appellees.

They must not be allowed to thus make it appear that the citizenship of Cummings and the fact that the State of Florida was the real defendant are of equal moment in determining the jurisdiction of this court with the grounds relied upon by appellants.

We plant ourselves upon the bill, motion, demurrer, answer, opinion, exceptions thereto, and assignment of errors, and say we are within the terms of the act of March 3, 1891, and present a case in which the construction of a treaty is drawn in question, and one in which the constitutionality of a law of the United States is drawn in question; and that we have been prejudiced by the construction of both treaty and law by the court below.

We submit that the case comes within the fifth section of the act of March 3, 1891, fifth subdivision; that this court has jurisdiction, and that the motion to dismiss should be denied.

WILLIAM WHITWELL DEWHURST,
Solicitor for Appellants.